

## **2013 Legislative Session Highlights**

Below is a listing of some of the major bills affecting the criminal justice community. It is not exhaustive but will be included with others in the 2013 Kansas Sentencing Guidelines Desk Reference Manual, which will be released later this year.

### **HB 2170**

#### **Sentencing, Postrelease Supervision, and Probation**

**HB 2170** makes numerous changes to sentencing, postrelease supervision, and probation statutes.

The bill allows a low-risk defendant who has paid all restitution and for 12 months has been compliant with the terms of probation, assignment to community corrections, suspension of sentence, or nonprison sanction to be eligible for discharge from such period of supervision by the court. In that instance, the court is required to grant the discharge absent substantial and compelling reasons for denying discharge. A person serving a period of incarceration for a supervision violation is not eligible for modification until the person is released and returned to postrelease supervision. The Prisoner Review Board also has the discretion to provide for early discharge from postrelease supervision if the defendant has petitioned for early discharge and has paid any restitution ordered.

Further, the bill provides program credits earned and subtracted from an inmate's prison sentence are not added to the inmate's postrelease supervision term, with the exception of a term for a person sentenced to prison for a sexually violent crime, a sexually motivated crime requiring the offender to register, electronic solicitation, or unlawful sexual relations. Similarly, the bill provides that good time earned and subtracted from the prison sentence or any other consecutive or concurrent sentence of a person sentenced to prison for a sexually violent crime, a sexually motivated crime requiring the offender to register, electronic solicitation, or unlawful sexual relations is added to the inmate's postrelease supervision term.

Concerning participation in drug abuse treatment programs, the bill allows for sanctions, in addition to revocation of probation (which already was allowed), when a defendant fails to participate in or has a pattern of intentional conduct that demonstrates the defendant's refusal to comply with or participate in a drug abuse treatment program.

In the area of violations of the conditions of release, assignment, or nonprison sanction, the bill allows a defendant arrested for such a violation to waive the right to a hearing on the violation, after the defendant has been apprised of the right by the supervising court services or community correctional services officer. If the original crime of conviction was a misdemeanor and the violation is established, the bill allows the court to continue or revoke the probation, assignment to community corrections, suspension of sentence, or nonprison sanction; require the defendant to serve the sentence imposed or any lesser sentence; and, if imposition of sentence was suspended, impose any sentence that originally might have been imposed.

If the defendant waives the right to a hearing and, in the sentencing order, the court has not specifically withheld the authority of court services or community corrections to impose sanctions, the defendant's supervising court services officer, with the concurrence of the chief court services officer, or

the defendant's community corrections officer, with the concurrence of the community corrections director, may impose an intermediate sanction of confinement in jail for up to six days each month in any three separate months during the period of release of supervision. The 6 days per month can be imposed only as 2-day or 3-day consecutive periods, not to exceed 18 total days of confinement.

If the original crime of conviction was a felony and the violation is established, the bill allows the court to impose the following series of increasing violation sanctions:

- Continue or modify the conditions of release;
- Impose the intermediate sanction of confinement in jail outlined above;
- If the violator already had at least one intermediate sanction of confinement in jail, remand the defendant to the custody of the Kansas Department of Corrections (KDOC) for a period of 120 days, which the Secretary could reduce by up to 60 days (this penalty could not be imposed more than once during the term of supervision);
- If the violator already had been remanded to KDOC custody for a period of 120 days, remand the defendant to KDOC custody for a period of 180 days, which the Secretary could reduce by up to 80 days (this penalty could not be imposed more than once during the term of supervision); or
- If the violator already had been remanded to KDOC custody for a period of 180 days, revoke probation, assignment to community corrections, suspension of sentence, or nonprison sanction; require the defendant to serve the sentence imposed or any lesser sentence; and, if imposition of sentence was suspended, impose any sentence that originally might have been imposed.

The bill provides, however, that the period of time spent in jail or in the custody of KDOC cannot exceed the time remaining on the person's underlying prison sentence. Upon completion of time spent in the custody of KDOC, the offender returns to community corrections supervision, and the bill specifies sheriffs are not responsible for the return of the offender to the county where the community correctional services supervision is assigned.

The court may revoke the probation, assignment to community corrections, suspension of sentence, or nonprison sanction without first imposing the preceding violation sanctions:

- If the court finds and sets forth with particularity the reasons for finding that the safety of members of the public will be jeopardized or that the welfare of the offender otherwise will not be served; or
- If the offender commits a new felony or misdemeanor or absconds from supervision.

For crimes committed on and after July 1, 2013, an offender whose nonprison sanction is revoked or whose underlying prison term expires after being remanded to the custody of KDOC is required to serve a period of postrelease supervision upon completion of the prison portion of the underlying sentence. Persons convicted of crimes committed on or after July 1, 2003, but before July 1, 2013, are not subject to a period of postrelease supervision. For offenders sentenced prior to July 1, 2013, who are eligible for modification of their postrelease supervision obligation, KDOC is required to modify the period of postrelease supervision pursuant to the schedule outlined in the bill.

Finally, the bill gives the Kansas Sentencing Commission (KSC) the authority to make statewide supervision and placement cutoff decisions based upon the risk levels and needs of the offender. Additionally, the KSC must periodically review data and make recommended changes and must determine the impact and effectiveness of supervision and sanctions for felony offenders regarding recidivism and prison and community-based supervision populations.

**SB 16**  
**Kansas Racketeer Influenced and Corrupt Organization Act; Criminal Street Gangs**

**SB 16** creates the Kansas Racketeer Influenced and Corrupt Organization Act (Kansas RICO Act). The bill also amends the criminal street gangs definition statute.

**Kansas RICO Act**

The Kansas RICO Act makes it a crime for any covered person:

- Who has with criminal intent received any proceeds from a pattern of racketeering activity or through the collection of an unlawful debt, to use or invest such proceeds in acquiring any title, right, interest, or equity in real property, or in the establishment or operation of any enterprise;
- Through a pattern of racketeering activity or through the collection of an unlawful debt, to acquire or maintain any interest in or control of any enterprise or real property; or
- Who is employed by, or associated with, any enterprise to conduct or participate in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt.

“Covered person” is defined as any person who is a criminal street gang member or associate, has engaged or is engaged in human trafficking or aggravated human trafficking, or has engaged in or is engaged in the unlawful manufacturing, cultivation, or distribution of controlled substances.

“Enterprise” is defined as any individual, sole proprietorship, partnership, corporation, business trust, Kansas union, legal entity, unchartered union, association, group of individuals associated in fact although not a legal entity, governmental entity, or criminal street gang.

“Pattern of racketeering activity” is defined as engaging in at least two incidents of racketeering activity that have the same or similar intents, results, accomplices, victims, or methods of commission, or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents. At least one of such incidents would have to occur after the effective date of the Act, and the last such incident would have to occur within five years, excluding any period of imprisonment, of a prior incident of racketeering activity.

“Racketeering activity” is defined as committing, attempting to commit, conspiring to commit, or soliciting, coercing, or intimidating another person to commit certain felony and misdemeanor crimes enumerated in the Act, or any conduct defined as “racketeering activity” in the federal RICO Act.

“Unlawful debt” is defined as any money or other thing of value constituting principal or interest of a debt that is legally unenforceable in Kansas because it was incurred or contracted in violation of various federal or Kansas racing, gambling, gaming, or usurious lending laws.

The Act also defines the terms “trustee,” “real property,” “documentary material,” and “beneficial interest.”

The crime created by this act or conspiracy to commit this crime is a severity level 2, person felony. The court also may impose a fine of up to three times the gross value gained or three times the gross loss caused, whichever is greater, if the defendant gained pecuniary value or caused personal injury, property damage, or other loss. Bail for persons charged with this crime is a minimum of \$50,000, unless certain conditions are met. Own recognizance (O.R.) bonds are not permitted.

The Act grants the district court the power to enjoin violations of the Act by divesting a defendant of any interest in any enterprise; imposing reasonable restrictions on activities or investments of the defendant; dissolving or reorganizing any enterprise; suspending or revoking a license, permit, or prior approval granted by a state agency; or ordering the forfeiture of a corporate charter or certificate, upon certain findings. All property used in the course of, intended for use in the course of, derived from, or realized through conduct violating the Act is subject to civil forfeiture.

Prosecuting attorneys are authorized to administer oaths or affirmations, subpoena witnesses or material, and collect evidence relating to activity violating the Act. They also are allowed to apply ex parte to a district court for an order requiring a subpoenaed person or entity to not disclose the subpoena to anyone except the subpoenaed person's attorney for a period of 90 days. Such order may be granted only if the prosecutor shows factual grounds reasonably indicating a violation of the Act, that the documents or testimony sought appear reasonably calculated to lead to the discovery of admissible evidence, and facts showing that disclosure of the subpoena would hamper or impede the investigation or cause a flight from prosecution. If a person or enterprise fails to obey a subpoena, the prosecuting attorney may apply to the district court for an order compelling compliance, and a person failing to obey any court order under the Act is subject to being adjudged in contempt of court and punishment by fine and imprisonment.

### **Criminal Street Gangs**

The bill amends the criminal street gangs definitions statute by adjusting the criteria required to identify a person as a "criminal street gang member." To meet the definition, a person must meet three or more criteria from a list set forth in the statute. The bill separates what had been three separate parts of a single criteria into three separate criteria: that the person frequents a particular criminal street gang's area; adopts such gang's style of dress, color, use of hand signs or tattoos; or associates with known criminal street gang members.

## **SB 20** **Kansas Offender Registration Act**

**SB 20** amends the Kansas Offender Registration Act to:

- Change the effective dates for registration requirements to reflect when various types of offenses originally were codified;
- Correct an inaccurate statutory reference to the crime of aggravated incest;
- Specify that persons convicted of involuntary manslaughter while driving under the influence are not required to register as this crime inadvertently was included when recodification of the criminal code placed the crime within the involuntary manslaughter section;
- Clarify registration requirements for offenders in the custody of a correctional facility and prior to the offender being discharged, paroled, furloughed, or released on work or school release;
- Strike language concerning "the duration of registration" that is unnecessary and has caused confusion as to how long an offender must register;
- Provide that registration is complete even when the offender does not remit the registration fee, and failure to remit full payment within 15 days of registration is a class A misdemeanor or, if within 15 days of the most recent registration 2 or more full payments have not been remitted, a severity level 9, person felony; and

- Amend requirements for providing DNA samples to the Kansas Bureau of Investigation to align the requirements with current KBI practices.

## **SB 58**

### **Methamphetamine Manufacturing - Special Sentencing Rule**

**SB 58** restructures: (a) the penalties for unlawful manufacturing of a controlled substance, under K.S.A. 2012 Supp. 21-5703, and (b) a special sentencing rule for a second or subsequent conviction of the same crime, under K.S.A. 2012 Supp. 21-6805(e), to clarify the application of the penalties and the rule depending on whether methamphetamine was the controlled substance at issue in the current conviction, the prior conviction, both, or neither.

If both the current and prior convictions do not involve methamphetamine, the crime is a drug severity level 1 felony and the special sentencing rule does not apply. If the prior conviction involved methamphetamine but the current conviction does not, the crime is a drug severity level 2 felony and the special sentencing rule applies, imposing a sentence of double the maximum duration of the presumptive term of imprisonment. If the prior conviction did not involve methamphetamine but the current conviction does, the crime is a drug severity level 1 felony and the special sentencing rule does not apply. If both the current and prior convictions involve methamphetamine, the crime is a drug severity level 1 felony and the special sentencing rule applies, imposing a sentence of double the maximum duration of the presumptive term of imprisonment.

## **Senate Substitute for HB 2034**

### **Human Trafficking - Advisory Board; Victim Assistance Fund; Related Crimes; Staff Secure Facilities and Civil Forfeiture**

**Senate Substitute for HB 2034** creates or amends several statutes related to the issue of human trafficking.

First, the bill authorizes the Attorney General, in conjunction with other appropriate state agencies, to coordinate training regarding human trafficking for law enforcement agencies throughout the state and would designate the Attorney General's Human Trafficking Advisory Board as the official human trafficking advisory board of Kansas. The bill also establishes the Human Trafficking Victim Assistance Fund, which will be funded by the collection of fines imposed as described in the following paragraphs. The funds will be used to pay for training provided and support care, treatment, and other services for victims of human trafficking and commercial sexual exploitation of a child.

The crime of "commercial sexual exploitation of a child" is created and defined as knowingly:

- Giving, receiving, offering or agreeing to give, or offering or agreeing to receive, anything of value to perform any of the following acts:
  - Procuring, recruiting, inducing, soliciting, hiring, or otherwise obtaining any person younger than 18 years of age to engage in sexual intercourse, sodomy, or manual or other bodily contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of the offender or another; or
  - Procuring, recruiting, inducing, soliciting, hiring, or otherwise obtaining any person where there is an exchange of value, for any person younger than 18 years of age to engage in sexual intercourse, sodomy, or manual or other bodily contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of the patron, the offender, or another;

- Establishing, owning, maintaining, or managing any property, whether real or personal, where sexual relations are being sold or offered for sale by a person younger than 18 years of age, or participating in the establishment, ownership, maintenance, or management thereof;
- Permitting any property, whether real or personal, partially or wholly owned or controlled by the defendant, to be used as a place where sexual relations are being sold or offered for sale by a person who is younger than 18 years of age; or
- Procuring transportation for, paying for the transportation of, or transporting any person younger than 18 years of age within this state with the intent of causing, assisting, or promoting that person's engaging in selling sexual relations.

Commercial sexual exploitation of a child is a severity level 5, person felony and carries a fine of not less than \$2,500 nor more than \$5,000, unless the person, prior to the commission of the crime, has been convicted of a violation of this section, in which case it is a severity level 2, person felony and carries a fine of not less than \$5,000.

Further, the crime or attempt, conspiracy, or criminal solicitation to commit the crime is an off-grid person felony when the offender is 18 years of age or older and the victim is less than 14 years of age. A fine of not less than \$5,000 also will be imposed.

Additionally, the court may order any person convicted of this crime to enter into and complete a suitable educational and treatment program regarding commercial sexual exploitation of a child.

Throughout, the bill changes "prostitution" to "selling sexual relations," "house of prostitution" to "place where sexual relations are being sold or offered for sale by a person who is 18 years of age or older," and "prostitute" to "person selling sexual relations who is 18 years of age or older."

The bill provides it is an affirmative defense to the crime of "selling sexual relations" that the defendant committed the crime because the defendant was subjected to human trafficking, aggravated human trafficking, or commercial exploitation of a child. Additionally, the bill allows persons convicted of prostitution or selling sexual relations who entered into a diversion agreement and who can prove they were acting under coercion caused by the act of another to petition the convicting court for the expungement of the conviction or diversion agreement and related arrest records after one or more years have elapsed since the person satisfied the sentence imposed or the terms of a diversion agreement or was discharged from probation, a community correctional services program, parole, postrelease supervision, conditional release, or a suspended sentence.

The bill requires a notice offering help to victims of human trafficking to be posted on the official websites of the Attorney General, Department for Children and Families (DCF), and the Department of Labor, providing information to help and support victims of human trafficking, including information about the National Human Trafficking Resource Center Hotline. The Secretary of Labor is required to consult with the Attorney General and create an education plan to raise awareness among Kansas employers about human trafficking, the hotline, and other resources. The Secretary is required to report progress to the House and Senate Judiciary Committees on or before February 1, 2014.

"Promoting prostitution" becomes "promoting the sale of sexual relations," which is a severity level 9, person felony, rather than a class A person misdemeanor, and requires a fine of not less than \$2,500 nor more than \$5,000. An exception will exist if the person, prior to the commission of the crime, has been convicted of a violation of K.S.A. 2012 Supp. 21-6420 (promoting the sale of sexual relations), in which case it is a severity level 7 person felony and carries a fine of not less than \$5,000.

The bill also renames the crime of "patronizing a prostitute" to "buying sexual relations" and expands the definition to include hiring a person selling sexual relations who is 18 years of age or older or entering a place where sexual relations are being sold or offered for sale with intent to engage in manual or

other bodily contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of the offender or another.

The crime becomes a class A person misdemeanor, rather than a class C misdemeanor, and carries a fine of \$2,500, except if the person, prior to the commission of the crime, has been convicted of a violation of this section, in which case it is a severity level 9 person felony and carries a fine of not less than \$5,000. Additionally, the court may order any person convicted to enter into and complete a suitable educational and treatment program regarding commercial sexual exploitation of a child.

Aggravated human trafficking committed in whole or in part for the sexual gratification of the defendant or another and commercial sexual exploitation of a child are classified as “sexually violent crimes” for the purposes of sentencing, postrelease supervision, and offender registration. A person convicted of commercial sexual exploitation of a child is required to register for life.

The bill adds commercial sexual exploitation of a child, if the victim is less than 14 years of age, to the list of crimes in the statute imposing a minimum 25-year sentence. Similarly, the bill adds aggravated human trafficking committed if the victim is less than 14 years of age and commercial sexual exploitation of a child, if the victim is less than 14 years of age, as a crime listed as a “crime of extreme sexual violence,” which is an aggravating factor considered in determining whether substantial and compelling reasons exist to impose a departure sentence.

Further, human trafficking, aggravated human trafficking, sexual exploitation of a child, commercial sexual exploitation of a child, and buying or selling sexual relations are added to the list of suspected crimes that justify a wiretap.

Statutes related to municipal courts are amended to impose the fines provided for the offenses described above and to direct the fines collected to the Human Trafficking Victim Assistance Fund.

The bill also creates a new section in and makes amendments to the Revised Code for the Care of Children, which will take effect January 1, 2014. Specifically, when any child is in custody who has been subjected to human trafficking, aggravated human trafficking, or commercial sexual exploitation of a child, or who has committed an act which, if committed by an adult, would constitute the crime of selling sexual relations, the court is required to refer the child to the Secretary of DCF. The Secretary is required to use a research-based assessment tool to assess the safety, placement, and treatment needs of the child, and make appropriate recommendations to the court.

The bill allows a law enforcement officer to take a child into custody if the officer reasonably believes the child is a victim of human trafficking, aggravated human trafficking, or commercial sexual exploitation of a child. The officer is required to place the child in protective custody and is allowed to deliver the child to a staff secure facility. The officer is required to contact DCF to begin an assessment of the child via a rapid response team to determine appropriate and timely placement.

The requirements for a “staff secure facility” are added to statutes and include: no construction features designed to physically restrict the movements and activities of residents; written policies and procedures that include the use of supervision, inspection, and accountability to promote safe and orderly operations; locked entrances and delayed-exit mechanisms to secure the facility; 24-hour-a-day staff observation of all entrances and exits by a retired or off-duty law enforcement officer; screening and searching of residents and visitors; policies and procedures for knowing resident whereabouts, handling runaways and unauthorized absences; and restricting or controlling resident movement or activity for treatment purposes. Such a facility will provide case management, life skills training, health care, mental health counseling, substance abuse screening and treatment, and other appropriate services to children placed there. Service providers in the facility will be trained to counsel and assist victims of human trafficking and sexual exploitation.

The bill also allows the court to issue an ex parte order placing a child in a staff secure facility when the court determines the necessity for an order of temporary custody and there is probable cause to

believe the child has been subjected to human trafficking, aggravated human trafficking, or commercial sexual exploitation of a child, or if the child committed an act, which, if committed by an adult, would constitute selling sexual relations. If the court places the child with DCF, the agency has the discretionary authority to place the child in a staff secure facility if the above circumstances exist.

The bill allows the court to enter an order of temporary custody following a hearing if the court determines there is probable cause to believe the child has been subjected to human trafficking, aggravated human trafficking, or commercial sexual exploitation of a child, or if the child committed an act, which, if committed by an adult, would constitute selling sexual relations. Under such circumstances, the court is authorized to place the child in a staff secure facility. Similarly, if the court places the child with DCF, the agency has the discretionary authority to place the child in a staff secure facility if the above circumstances exist.

If a child has been removed from the custody of a parent, the court may award custody to a staff secure facility if the circumstances described above exist.

Further, the bill amends the Revised Kansas Juvenile Justice Code to allow for expungement of a juvenile's records and files if the court finds one year has elapsed since the final discharge for an adjudication concerning acts committed by a juvenile, which, if committed by an adult, would constitute selling sexual relations.

Finally, the bill adds commercial sexual exploitation of a child to the list of offenses giving rise to civil forfeiture.

## **HB 2218**

### **Driving Under the Influence of Alcohol or Drugs**

**HB 2218** amends statutes concerning the crime of driving under the influence of alcohol or drugs (DUI). First, the bill amends the law governing when a law enforcement officer must request a person submit to alcohol or drug testing. Specifically, the bill adds to language concerning an officer's reasonable grounds to believe the person was DUI to require that the officer have such a belief "at the time of the request." Further, the bill requires an officer to request alcohol or drug testing when the officer has such a belief and the person has been arrested or otherwise taken into custody for any violation of any state statute, county resolution, or city ordinance. Testing already was required if the person was arrested or taken into custody for a DUI offense.

The bill specifies that the sentence for felony violation of criminal refusal and commercial DUI is that provided for in the specific mandatory sentencing requirements of those statutes.

The bill also amends the definition of the crime of aggravated battery to include DUI:

- When great bodily harm to another person or disfigurement of another person results from such act, which is a severity level 5, person felony; and
- When bodily harm to another person results from such act under circumstances whereby great bodily harm, disfigurement, or death can result from such act, which is a severity level 8, person felony.

For the purpose of determining whether a new DUI conviction is a first, second, third, or subsequent conviction, which impacts the penalty imposed, aggravated battery while DUI is considered a prior DUI conviction. The bill also adds clarifying language concerning DUI offenses committed by persons under the age of 21 and replaces "drive" with "operate."

Finally, the bill amends the boating under the influence statutes to make them more consistent with DUI statutes. The changes include:



- Adding a provision prohibiting the operation or attempt to operate any vessel while the alcohol concentration in the person's blood or breath as shown by any competent evidence, including other competent evidence (as defined in statute), is 0.08 or more;
- Changing the time period within which a person is prohibited from operating or attempting to operate a vessel if that person's alcohol concentration is 0.08 or more from two hours to three hours;
- Revising the prohibition on operating a vessel while under the influence of alcohol to include the phrase "to a degree that renders the person incapable of safely operating a vessel";
- Removing a provision prohibiting the operation of a vessel by a habitual user of any narcotic, hypnotic, somnifacient, or stimulating drug; and
- Revising the definition of "other competent evidence" to extend the time for sampling from two hours to three hours.

The boating under the influence provisions of the bill will be effective from and after January 1, 2014, and their publication in the statute book.

## **HB 2252**

### **Statute of Limitations for Rape and Sexually Violent Crimes**

**HB 2252** allows a prosecution for rape or aggravated criminal sodomy to be commenced at any time. Additionally, the bill allows for prosecution of a sexually violent crime to commence within ten years when the victim is 18 years old or older. When the victim is under 18 years, the bill allows for prosecution of a sexually violent crime to commence within one year of the date the identity of the suspect is conclusively established by DNA testing, or within ten years (increased from the former period of five years) of the date the victim turns 18 years of age, whichever is later.

## **HB 2278**

### **Crimes Involving Firearms**

**HB 2278** makes theft of a firearm valued at less than \$25,000 a severity level 9, nonperson felony. Previously, there was no penalty specific to theft of firearms; however, theft of property valued between \$1,000 and \$25,000 was a severity level 9, nonperson felony, and theft of property valued below \$1,000 was a class A nonperson misdemeanor. For theft of property from three separate mercantile establishments within 72 hours as part of the same act or transaction or in two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct, a severity level 9, nonperson felony, the bill adds a maximum value of \$1,000 for the property.

Additionally, pursuant to the bill, criminal deprivation of a firearm becomes a severity level 9, nonperson felony. The former law had no penalty specific to criminal deprivation of a firearm; however, criminal deprivation of property other than a motor vehicle was a class A nonperson misdemeanor, and a second or subsequent conviction carried a sentence of at least 30 days imprisonment and a fine of at least \$100.

Finally, burglary with intent to commit the theft of a firearm becomes a severity level 5, nonperson felony. Formerly, burglary was either a severity level 7 or severity level 9, nonperson felony.